United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1497

To be argued by
JAMES C. LANG

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

DUDLEY D. MORGAN, JR.,

Defendant-Appellant.

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REPLY BRIEF FOR
DEFENDANT-APPELLANT DUDLEY D. MORGAN, JR.

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TABLE OF CONTENTS

CASES

PROPOSITION I

THE TRIAL COURT ERRED IN REFUSING TO STRIKE TESTIMONY ASSOCIATING MORGAN WITH THE "MAFIA" AND "OKLAHOMA MAFIA" OR, IN THE ALTERNATIVE, IN FAILING TO LIMIT THE USE OF THE TESTIMONY IN ANY MANNER THEREBY DENYING MORGAN'S RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW.

The government attempts to establish that the statement concerning the Mafia had probative value because it tended to show that Morgan was angry when the purported statement was made. This is interesting in that it is apparently a new theory developed for purposes of appeal. The trial court apparently allowed the statement to be admitted into evidence merely upon the grounds that Morgan made the statement, and it appears that the only theory the government had at trial for the admissibility of the statement was that it was an example of Morgan's "puffing and misstatements."

If in fact the statement indicated that Morgan was angry, it would also logically indicate that Morgan might contact an organization known as the "Oklahoma Mafia" in order to give vent to his anger. Therefore, if the statement had probative value, such value was far outweighed by the prejudicial impact of the inference that Morgan, because he was angry, might contact the "Oklahoma Mafia."

The government attempts to minimize the effect of the testimony concerning Oklahoma Mafia by pointing out that

the prosecutor in closing argument stated that the remark was another example of Morgan's "puffi[illegible] and misstatements." As indicated in Morgan's original brief, this statement by the prosecutor at trial appeared to be an attempt to give some basis for the introduction of the testimony and was certainly not intended to demonstrate that the government did not believe that Morgan was connected with such an organization. In fact, the prosecutor asked the jury the question, "Is there an Oklahoma Mafia?"[1/] He did not answer this question and certainly did not definitely inform the jury that no such organization existed. The prosecutor in this case did not advise the jury that it was "totally untrue" that Morgan had Mafia connections.

The government's attempt to minimize the effect of Dell'Aglio's testimony concerning Morgan's purported statements should be disregarded. Part of Morgan's purported statement was, "We have an Oklahoma Mafia here [in Oklahoma]."[2/] Such a purported statement leads to the inescapable inference that Morgan was in some way connected with an organization known as the Oklahoma Mafia. None of the prosecutor's statements in closing argument cure this prejudice, but on the contrary tend only to emphasize the prejudicial matter.

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1. 104A.

2. 79A. [Emphasis supplied.]

The government concedes that reversals have occurred in cases where the prosecutor has gratuitously used the term "Mafia." As set forth in Morgan's original brief, there can be no valid distinction between the prejudicial impact of the term Mafia when it is adduced by the prosecutor and when it is adduced by the trial court. Morgan respectfully submits that this is an appropriate case for a reversal and remand for new trial on the basis set forth above.

PROPOSITION II

THE TRIAL COURT ERRED IN REFUSING TO SUSTAIN MORGAN'S OBJECTION TO THE PROSECUTOR'S QUESTIONS TO MORGAN'S CHARACTER WITNESSES WHICH QUESTIONS PRESUMED MORGAN'S GUILT AND THIS ERROR CONSTITUTED A DENIAL OF DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

The government seeks to legitimize the improper hypothetical question propounded to Morgan's character witnesses by asserting that the question somehow sought to probe the sufficiency of the opinions of the witnesses. If the question really sought to do this, it would be much less troublesome for the government. The plain language of the question indicates that it does not.[3/] The question has nothing to do with rumors the witnesses have heard or the

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3. The question asks "If Mr. Morgan knew that Display Sciences was in receivership at the time he was selling shares of Display Sciences stock between May and June, 1972 and didn't tell that to his customers, would your opinion of him change at all?" (Tr. 763, 854, 869.)

basis of the witnesses' opinions. It simply asks the witnesses to state whether, if part of the facts charged in the indictment were true, their opinion of the Defendant would be the same.

Although the plain language of the question demonstrates it does not probe the sufficiency of the opinion of the witnesses, this proposition is asserted by the government to vainly attempt to bring the question within the ambit of cross-examination held proper in United States v. Blane, 375 F.2d 249 (6th Cir. 1967). However, Blane can give the government little comfort. Not only is Blane clearly distinguishable from the instant case, it stands squarely opposite the holding in Sloan v. United States, 31 F.2d 902 (8th Cir. 1929).[4/]

In Blane, the prosecutor was allowed to question the sufficiency of the opinion of a character witness by

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4. In Sloan, the Eighth Circuit stated:

> The patent purpose of counsel was not impeachment, but to get before the jury the incident of this search of appellant's room when such was not itself proper testimony .... The defense here was that there was never any conspiracy and that trip to Kansas City was, so far as appellant was concerned, entirely innocent. There was no testimony of previous criminal character or even of bad reputation to weaken the effect and possibly mitigate the error of this cross-examination. Sloan v. United States, supra, at 906.

determining the source of his opinion of good character. Part of the challenge to the sufficiency was the witnesses' knowledge of rumors abroad in the community concerning the defendant. The trial court held that consideration of rumors abroad in the community embraced those rumors which may be gleaned from reading the newspaper. United States v. Blane, supra, at 250.

Testing the sufficiency of the opinion of a character witness by asking what rumors he may have relied upon in forming his opinion of good character is a long standing and accepted rule of cross-examination. What happened in the instant case is quite different. In this case the prosecutor sought to directly challenge the character witnesses' opinions by asking them if their opinions of Morgan would change if Morgan knew the company was in receivership when he sold the stock and did not tell his customers about the receivership--the exact criminal act with which Morgan was charged! In other words, the character witnesses were forced to assume the commission of the criminal act (the guilt of Morgan) in answering the improper question. All answered that their opinion would change and thus Morgan was saddled with a presumption of guilt of the crime charged. This was particularly devastating in the present case as Morgan relied heavily upon his character witnesses in establishing his "good faith" defense.

There cannot be any misunderstanding of the holding in Blane because the trial court clearly instructed the jury as to the purpose of that cross-examination:

> ...[I]t is permissible and proper for the prosecution to cross-examine these witnesses to test the sufficiency of the witnesses' knowledge to determine if they are qualified to give an opinion by inquiring into the extent of the acquaintanceship of the witness with the defendant, the community in which he has lived, and the circles in which he has moved, so that the court and jury can determine if the witnesses are qualified to speak with authority of the terms in which generally the defendant is regarded. [Emphasis supplied.] United States v. Blane, supra, at 251.

In the instant case, the improper question patently does not seek to test the knowledge of the witness as to his acquaintanceship with Morgan. It has nothing to do with rumors in the community or what the witness knows about Morgan. The prosecutor simply selected a portion of the indictment and asked the witness if his opinion would change if Morgan had committed those acts charged.[5/]

Blane is further distinguishable from the instant case because in Blane the trial court clearly admonished the jury that the evidence sought only related to the knowledge

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5. In Morgan's original brief, Morgan points out an additional reason for the impropriety of the question propounded by the prosecutor was that it assumed the fact of the misconduct, which misconduct was the very issue being litigated. Brief and Appendix for Defendant-Appellant, Dudley D. Morgan, Jr., pp. 34-38. There is no rejoinder for this argument and the Answer Brief contains none.

of the witness of the character of the defendant and his acquaintanceship with the defendant. The jury was specifically admonished that they were to consider it for no other purpose.

> Therefore, you are not permitted to draw any inference or assumption as to contents of any rumors or newspaper articles from the questions asked by the prosecution of the character witnesses.
>
> The cross-examination by the prosecution of the character witnesses is limited to testing the sufficiency of the opinion of the witnesses as to general reputation of the defendant and can be considered by you only in determining what weight you shall give the testimony of the character witnesses." [Emphasis supplied.] United States v. Blane, supra, at 251.

In Blane, the Sixth Circuit also specifically relied upon the admonition by the trial judge in holding the question concerning rumors from newspapers to be proper.

> ...[T]he jury was carefully warned that the prosecution's questions could only be used to test whether the witnesses' avowed familiarity with the defendant's reputation was broad enough to include an awareness that reports of certain incidents, derogatory of that reputation, had been carried in the newspapers. [Emphasis supplied.] United States v. Blane, supra, at 251.

Having clearly distinguished the facts in Blane from those in the instant case, Morgan again asserts that no appellate court has ever failed to reverse a case in which a question posed to a character witness presupposed the commission of the crime charged. Sexton v. State, 312 So.2d 71 (Ala. 1975); Diggs v. State, 88 S.W.2d 103 (Tex. 1935);

Craft v. Mississippi, 181 So.2d 140 (Miss. 1965); Broussard v. State, 114 S.W.2d 248 (Tex. 1938); Gaugh v. Commonwealth, 87 S.W.2d 94 (Ky. 1935).

The government's argument concerning waiver is totally unfounded, and perhaps can be viewed as a tacit recognition of the correctness of Morgan's argument on the merits. The case of United States v. Indiviglio, 352 F.2d 276 (2nd Cir. 1965), cert. den., 383 U.S. 907 (1966), cited by the government in support of its contention concerning waiver, is clearly not in point. In Indiviglio, a defendant entered an objection based upon certain specific grounds and sought relief on appeal based upon different grounds. The case says nothing about a situation in which a defendant's objection, on clear grounds, to a specific question is overruled and the identical question is asked to subsequent witnesses. The objection in this case was obviously sufficient, and it was not necessary to object further to preserve the error on appeal.[6/]

The government makes several assertions in its brief which are astounding indeed. It argues that the

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6. Awkard v. United States, 352 F.2d 411 (D.C. Cir. 1965). It will be noted that objections were not made with regard to every character witnesses in Sexton v. State, supra, and Craft v. State, supra, and it would appear that in Diggs v. State, supra, only one objection is mentioned in the opinion, even though the improper question was asked to more than one witness. In none of these cases did the court even consider the argument that failure to object to the question each time it was asked might constitute a "waiver."

hypothetical question raised nothing which was not already before the jury as a "reasonable reference from the evidence." Answer Brief, p. 21. Does not this amazing assertion itself presume Morgan guilty of the facts which were contained in the question propounded the character witnesses? Might the assertion be better phrased that the hypothical question raised nothing which was not already before the jury as a reasonable presumption of guilt rather than "reference from the evidence"? It means the same.

The government next cites a number of cases holding that the government can cross-examine a character witness concerning his knowledge of prior arrests of the defendant. Morgan agrees with this proposition but no response is necessary---this is not the issue here. Answer Brief, p. 21. The point is that the government could not attack Morgan's character by arrests or by any other permissible method, so it pursued the impermissible course of asking the improper question.

The government next argues that Morgan should swap his presumption of innocence for Judge Wyatt allowing him five character witnesses and an instruction that the testimony of character witnesses alone can raise a reasonable doubt. Answer Brief, p. 22. This argument is simply absurd! Morgan has as much right to call character witnesses and receive a proper instruction as to the law as the government has to make an opening statement. Such an argument clearly demonstrates the weakness of the government's position.

The government has not produced a single case to support its position. All authority and reasoning is contrary to its position. It is therefore requested that this case be reversed and remanded for a new trial.

PROPOSITION III

THE TRIAL COURT ERRED IN REFUSING TO PERMIT TESTIMONY IN SUPPORT OF MORGAN'S "GOOD FAITH" DEFENSE, AND THEREBY DENIED MORGAN'S RIGHT TO A FAIR TRIAL AND TO DUE PROCESS OF LAW.

The government contends that evidence as to what McCarthy may have told salesmen, who were not insiders at Display Sciences, Inc., was "remote" and "confusing," and was not admissible concerning the issue as to what Morgan was told by McCarthy. The government admits that what Morgan himself was told by McCarthy was relevant and material.[7/] The government appears to take the position that what McCarthy told the salesmen was not relevant at all, but the main thrust of the government's argument is that the evidence, if relevant, could still be excluded by the trial court as "confusing and remote" under Rule 403 of the Federal Rules of Evidence.

With regard to relevance, Morgan respectfully submits that the rather complex facts presented in this securities fraud and mail fraud prosecution tend to obscure the real issue presented here. A simpler fact situation was

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7. Answer Brief, p. 23.

presented in United States v. Carter, 491 F.2d 625 (5th Cir. 1974), which involved a prosecution for receiving and concealing two stolen automobiles. Defendant Carter's defense was based upon the contention that he had not known the cars were stolen. Defendant Carter attempted to testify as to a conversation he had with his cousin, in which his cousin had purportedly given Carter permission to use the car. The evidence was excluded as "hearsay," and the Fifth Circuit found this exclusion constituted reversible error.

Suppose that in United States v. Carter, supra, a third party had offered testimony to the effect that Carter's cousin had stated he had loaned the vehicle to Carter. It is true that such testimony would not have come from the defendant himself, and to that extent might be simplistically viewed as "more remote." However, one critical point is that the third party's testimony, while not establishing beyond any doubt that the cousin told Carter the same thing, certainly makes it much more probable that Carter was told the same thing by his cousin. Another critical point is that the third party does not have the same interest in the case,[8/] and, in light of the third party's testimony, the defendant's explanation would be much more likely to be believed by the jury. This is particularly important when a defendant is replying upon a "good faith" defense.

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8. The trial court's instruction concerning Morgan's own interest in the case illustrates Morgan's crucial need to support his own testimony with that of witnesses whose interest in the case is not as "deep," (95A).

While the prosecution in this case is more complex than that in United States v. Carter, supra, the same principles must apply. McCarthy's statements to the salesmen in this case are just as material and important to the defense as would be the cousin's statements to Carter.

As is admitted by the government,[9/] the trial court allowed the admission of testimony concerning statements by Dell'Aglio to Mr. Roberts and Mrs. Morgan. It is difficult to understand how testimony by third parties concerning statements made to them by McCarthy would be more "remote" or more "confusing" than testimony by third parties concerning statements made to them by Dell'Aglio. Thus, the decision by the trial court to exclude the testimony in reference to McCarthy seems totally arbitrary and without any valid basis. There can be no argument that the testimony was "merely cumulative," since Morgan stated he had received information from both Dell'Aglio and McCarthy, and therefore it was just as relevant to establish what McCarthy had told third parties as to establish what Dell'Aglio had told third parties.

The trial court certainly has the discretion, pursuant to Rule 403 of the Federal Rules of Evidence, to exclude evidence, even though it is relevant, in appropriate cases. However, none of the factors set forth in Rule 403

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9. Answer Brief, p. 23.

which would allow such an exclusion are present in this case. There would have been no danger, if such evidence had been admitted, of unfair prejudice to the government, confusion of the issues, or misleading the jury. There can be no serious contention by the government that brief testimony by one or two witnesses concerning what McCarthy had told them would have caused an undue delay or waste of time. The only other factor set forth in Rule 403, to wit, "needless presentation of cumulative evidence," is clearly not applicable since, as discussed above, evidence concerning McCarthy's statements is not cumulative. The government's main argument, which is that the trial court properly excluded the testimony concerning McCarthy's statements based upon Rule 403, is therefore without foundation.

The excluded evidence was relevant and did not fall within any of the categories set forth in Rule 403 which would allow its exclusion even though relevant. It is therefore requested that the case be reversed and remanded for a new trial.

CONCLUSION

Based upon the arguments and authorities set forth above, Morgan prays that the case be reversed and remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, James C. Lang, do hereby certify that I mailed a true and exact copy of the foregoing Reply Brief for Defendant-Appellant Dudley D. Morgan, Jr. to Michael Eberhardt, Esquire, Special Assistant United States Attorney, United States Department of Justice, One St. Andrew's Place, New York, New York 10007, with sufficient and proper postage thereon this 18TH day of February, 1977.

_____

James C. Lang